ANTITRUST LAW—FRANCHISES—ANTICOMPETITIVE PURPOSE PRESUMED WHERE THERE IS CONCERTED REFUSAL TO DEAL

In *De Filippo v. Ford Motor Co.*[1] the United States District Court for the Eastern District of Pennsylvania held[2] that as a general rule subject to exception, an anti-competitive purpose within the meaning of the Sherman Antitrust Act[3] may be presumed "in a situation where there is a concerted refusal to deal with a party on any terms or only on unfavorable terms, and that no specific finding of anti-competitive purpose, let alone a purpose to entirely exclude from the market need be made."[4]

Plaintiffs were Philadelphia area Ford dealers whose franchise, "Chestnut Motors," was totally destroyed by fire on October 15, 1969. During subsequent negotiations with Ford for reestablishment of the franchise, plaintiffs were offered certain favorable terms as an inducement to their acquisition of a company owned dealership. The dealership under consideration, "Presidential Motors," had never operated at a profit and was continually subsidized by Ford in order to remain operational.[5] However, under pressure from the remaining area dealers, Ford agreed to withdraw its offer of favorable terms.[6] After plaintiffs refused to accept the altered proposal, Ford terminated plaintiffs' existing franchise.[7] Plaintiffs brought suit in federal district court, contending that defendant's act of conspiring with its dealers to prevent plaintiffs from becoming dealers at Presidential violated the Sherman Act; that defendant's threat and ultimate termination of plaintiffs' franchise was in bad faith and in violation of The Automobile Dealer's Day in Court Act,[8] and that Ford's refusal to allow plain-

1. 378 F. Supp. 456 (E.D. Pa. 1974).

2. This holding followed the court's consideration of post trial motions under rules 50 and 59 of the Federal Rules of Civil Procedure.

3. 15 U.S.C. §§1-7 (1970).

4. 378 F. Supp. at 464.

5. In order to persuade plaintiffs to lease the premises and purchase the unprofitable dealership as a franchise, Ford offered to defer a substantial portion of all rental charges until the last years of the lease and offered a three month trial period free of any monetary investment. *Id.* at 459.

6. The remaining Philadelphia area Ford dealers had not received such favorable terms and were displeased that plaintiffs would be allowed to compete in such a preferential manner. One particular dealer threatened Ford with a Robinson-Patman suit, 15 U.S.C. §§13, 21 (1970), unless the favorable terms offered to plaintiffs were withdrawn. In a meeting with those dealers a vice-president of Ford agreed to withdraw the contested terms. *Id.* at 464-65.

7. Evidence indicated that the termination was a result of plaintiffs' refusal to sign a waiver of legal action against Ford, arising from the aborted Presidential negotiations. *Id.* at 460.

8. 15 U.S.C. §§1-5 (1970).

tiffs to commence operation of the Presidential Dealership constituted breach of contract. The jury found for plaintiffs on the antitrust claim and awarded $750,000, trebled to total 2.5 million. Defendant's made post-trial motions on the bases that plaintiffs' verdict on the antitrust claim was based on insufficient evidence and was contrary to existing case law. These motions were disallowed by the court[9] and the judgment for plaintiffs was upheld.

The Sherman Antitrust Act was promulgated by Congress to arrest an increasing concentration of power and wealth, and to preserve competition among a large number of sellers.[10] Although conceived as a weapon against the forces of monopoly, the Sherman Act is also directed at any "conspiracy in restraint of trade."[11] Its purpose is to preserve a system of free competition by suppressing any undue restraints imposed upon the free economic system.[12]

In 1911 the United States Supreme Court in *Standard Oil Co. of New Jersey v. United States*[13] considered the origin and congressional intent of the Sherman Act and concluded that a strict interpretation would condemn all trade regulations regardless of merit. Therefore, the *Standard Oil* Court adopted a "Rule of Reason"[14] based on common law principles, whereunder a restraint of trade became a violation if unreasonable. Early criteria for establishing unreasonableness were outlined in *United States v. American Tobacco Co.*[15]; included were acts which prejudiced public interest by unduly restricting competition or unduly obstructing the due course of trade, as well as acts which injuriously restrained trade either

9. The jury determined as a matter of fact that the agreement between Ford and its dealers that led to the withdrawal of the special terms constituted a conspiracy and an unreasonable restraint of trade, despite a finding that the purpose of the agreement was not to totally prevent plaintiffs from becoming Ford dealers in the Philadelphia area. It also found that Ford had violated the Automobile Dealer's Day in Court Act, but determined that plaintiffs' terminated franchise was valueless, and therefore found for defendants on this count. It was further determined by the court that a contract encompassing the favorable terms was in fact entered into by the parties, but since the contract was unsigned, and since Ford was not found to have been perpetrating a fraud, the jury was instructed that the contract was unenforcable as within the statute of frauds, and therefore held for defendants on this count. 378 F. Supp. at 460-61.

10. United States v. Von's Grocery Co., 384 U.S. 270 (1966).

11. 15 U.S.C. §1 (1970).

12. Hiland Dairy, Inc. v. Kroger Co., 402 F.2d 968 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969).

13. 221 U.S. 1 (1911).

14. It becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act and thus the public policy which its restrictions were obviously enacted to subserve. *Id.* at 62.

15. 221 U.S. 106 (1911).

because of their inherent nature or effect or because of their evident purpose.

Recent antitrust cases such as *De Filippo* have found a nexus in *Standard Oil* in that the latter provided early and firm foundation for the proposition that the "wrong" contemplated under the Sherman Act is in fact a wrongful result, and therefore *restraint* of trade establishing a violation need not fit an inflexable set of criteria. If the spirit or purpose of the Act is violated, then the lack of true monopolistic form in a specific restraint will not preclude a determination that the restraint is unreasonable.[16]

In *Northern Pacific Railway v. United States*[17] the court firmly established the "per se doctrine" as an alternative to the "Rule of Reason." *Northern Pacific* held that "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[18] As outlined in *Northern Pacific* and later in *White Motor Co.v. United States*,[19] the advantage inherent in a "per se" determination is a much less stringent evidentiary requirement.[20]

In *Kennedy v. Long Island Railroad*[21] the court emphasized that application of the per se doctrine should depend upon the consequences of the act, looking "only to conduct which of necessity produces consequences violative of the statute . . . or produces proscribed consequences in such an overwhelming proportion of the cases that minute inquiry in every instance would be wasteful of judicial and administrative resources."[22] The per se rule has been applied in several different situations, including tying arrangements,[23] agreements among competitors to divide markets[24] or allocate customers,[25] agreements to limit production,[26] and price fixing arrangements.[27]

An important area of per se liability which encompasses the factual

16. There can be no doubt that the sole subject with which the first section [of the Sherman Act] deals is restraint of trade as therein contemplated, and that the attempt to monopolize and monopolization is the subject with which the second section is concerned. 221 U.S. at 50-51.
17. 356 U.S. 1 (1958).
18. *Id.* at 5.
19. 372 U.S. 253 (1963).
20. *Id.* at 262.
21. 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963).
22. *Id.* at 370.
23. 356 U.S. 1 (1958).
24. United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956).
25. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).
26. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).
27. United States v. Container Corp. of America, 393 U.S. 333 (1969).

situation in *De Filippo* is that involving group boycotts. In *Fashion Originators Guild, Inc. v. FTC*[28] the court defined a group boycott as "a combined refusal to deal with anyone as a means of preventing him from dealing with a third person, against whom the combined action is directed."[29] In *White Motor Co. v. United States*[30] the court characterized group boycotts as naked restraints of trade and conspiratorial agreements which have no purpose except the stifling of competition.[31] With the focus on the monopolistic tendencies of unreasonable restraint of trade, the courts have used a variety of alternative tests in their application of the Sherman Act to group boycott situations. In *Klor's Inc. v. Broadway Hale Stores, Inc.*[32] a group of manufacturers conspired with retail distributors to deny the plaintiff access to certain lines of home appliances. The Court examined the elements of a per se group boycott situation, including the refusal to deal at all or only on unfavorable terms, the resultant exclusion of plaintiff from the market, or his denial of access to specific product lines. The Court's conclusion was that the conspiracy had by its "nature and quality a monopolistic tendency,"[33] and was in fact a group boycott and therefore a per se unreasonable restraint of trade.

In a more recent Supreme Court decision involving group boycotts, *United States v. General Motors Corp.*,[34] the Court encountered the classic pattern of the group boycott in restraint of trade - a simple vertical-horizontal agreement to which the manufacturer and all collaborating dealers were parties. The *General Motors* opinion encapsulated the previous group boycott decisions, with the Court stating that the principle of these cases is that where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, no inquiry is needed into the economic motivation underlying their conduct.[35] The *General Motors* case provides further illustration of those elements of refusal to deal and market restrictions which, when perpetuated by a conspiracy, become a patently unreasonable group boycott.

In the 1969 case of *Joseph Seagram & Sons, Inc. v. Hawaiian Oke & Liquors Ltd.*[36] the Ninth Circuit attempted to solidify the basis for a determination of per se liability in group boycott situations. The reasoning in that case provided the primary foundation for the 1974 decision in *De Filippo*.[37] The *Seagram* court relied heavily on the logic that the most

28. 114 F.2d 80 (2d Cir. 1940), *aff'd*, 312 U.S. 457 (1941).
29. 114 F.2d at 84.
30. 372 U.S. 253 (1963).
31. *Id.* at 263.
32. 359 U.S. 207 (1959).
33. *Id.* at 213.
34. 384 U.S. 127 (1965).
35. *Id.* at 140.
36. 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).
37. The *De Filippo* court realized that the *Seagram* court had, by its own admission,

important element in identifying a per se group boycott is the motive or intent behind the agreement.[38] As realized at an early date in *Standard Oil*, any business agreement has the potential to restrain trade. In fact, the dividing line between a legitimate business agreement and a conspiracy between competitors to unreasonably restrain trade can be quite elusive. However, if the agreement was not made with the purpose of injury to the plaintiff, then it does not become a per se group boycott merely because of its result. Incorporating this logic, the *Seagram* court held that "the mere fact of a combination or conspiracy does not necessarily result in per se liability."[39] The *Seagram* court stated that "in all [the group boycott per se cases] there was a purpose *either* to exclude a person or a group from the market, *or* to accomplish some other anti-competitive objective or both."[40] The anticompetitive objective described in *Seagram* and relied upon by the *De Filippo* court is the concerted action by one group to put one or more of their competitors out of business, or to impair their ability to compete with the conspirators.[41]

The *De Filippo* decision offers one example of the alternative approaches available in determining whether a violation of the Sherman Act has taken place. Upon post trial consideration the court determined that plaintiffs had presented insufficient evidence to establish a rule of reason violation,[42] and based their affirmance of plaintiffs' verdict on the determination that defendant's actions constituted a group boycott, and therefore was a per se violation of the Sherman Act.[43] The court explained its sudden shift to per se consideration by applying the instant facts to those elements of a group boycott earlier defined in *Klor's* and candidly concluded that Ford could not be held liable merely on the basis of a conspiracy; that the conspiracy (as determined by the jury) did not take from plaintiffs their access to any Ford dealership in an open competitive market; that the agreement did not totally exclude plaintiffs from the market; that it did

limited its holding to a particular factual situation, *i.e.*, the retraction of an exclusive distributorship via agreement between manufacturer and the newly selected distributor. 378 F. Supp. at 464 n.11. However, the court in *De Filippo* admittedly relied heavily on *Seagram* dicta as dispositive of the characteristics of group boycott situations leading to per se liability. *Id.* at 464.

38. Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847, 876-77 (1955).

39. 416 F.2d at 76.

40. *Id.* (emphasis added).

41. *Id.* at 77.

42. 378 F. Supp. at 461. The jury had returned a finding that defendant's actions constituted an unreasonable restraint of trade. Plaintiffs' counsel agreed with the court, admitting that such a determination of "unreasonableness" would require a substantial burden of statistical proof, and would be necessary only if a per se violation was not established. The court therefore concluded that the lack of this sort of evidence precluded a determination of unreasonableness via the rule of reason approach. *Id.* at 462.

43. *Id.* at 464.

not totally deny access to a line of merchandise; and that the terms finally offered to plaintiffs were not less favorable than those received by the other area dealers.[44] This agreement, resulting in a refusal to deal as per negotiated terms, in fact denied plaintiffs access to only a portion of the defendant's product.[45]

The key to the *De Filippo* decision is found in the court's adoption and adaptation of the reasoning in *Seagram*.[46] Rejecting the defendant's contention that a group boycott per se violation requires a determination that the purpose of any conspiracy must be to "totally" exclude plaintiffs from the market,[47] the *De Filippo* court seized on the alternative language of *Seagram*, reasoning that a violation could also be found if the agreement was for the accomplishment of an anticompetitive objective. The court then extended the application of this dicta by stating that the necessary anti-competitive purpose "can generally be presumed in a situation where there is a concerted refusal to deal with a party on any terms, or only on unfavorable terms, and that no specific finding of anti-competitive purpose, let alone a purpose to entirely exclude from the market, need be made."[48]

In addressing defendant's contentions as to the degree of market exclusion required for a determination of per se liability, the court adopted the position that a lesser degree of exclusion than that found in *Klor's*[49] could still lead to per se liability. Emphasizing that if the exclusion was the product of an anti-competitive purpose, the court stated that liability would require only that plaintiffs be deprived of one mode of access to defendant's product.[50] The effect of *De Filippo* was to create a presumptive test for determining a per se violation in a group boycott situation. Earlier cases required a finding of either a purpose to exclude competitors from a significant portion of the market, or the accomplishment of some other anti-competitive objective. The court in *De Filippo* would not only predi-

44. In fact the court admitted that the agreement to deny plaintiffs the original proferred terms "merely prevented [them] from acquiring a dealership on special terms." *Id.* at 463.

45. The court felt the result was the same whether the product was considered to be a Ford automobile or a particular dealership. *Id.* at 463 n.10.

46. The *Seagram* decision was cited by the defendant in *De Filippo* because the court there had held for defendant on plaintiffs' claim of a group boycott per se violation. 416 F.2d at 79.

47. 378 F. Supp. at 463.

48. *Id.* at 464. It should be noted that the court established an exception to this test in exclusive dealership situations like those found in *Seagram* and the later case of Ark Dental Supply Co. v. Cavitron Corp., 461 F.2d 1093 (3rd Cir. 1972) because the replacement of one exclusive dealer with another must always create a concerted refusal to deal. Therefore the presumptive test of a concerted refusal to deal is replaced by a more stringent evidentiary requirement.

49. In *Klor's* the defendants' refusal to deal was for the purpose of, and resulted in plaintiff being denied access to a complete line of merchandise. 378 F. Supp. at 463.

50. *Id.* at 466.

cate liability on such a finding, but would in addition assess liability via presumption, where there is a concerted refusal to deal at all, or only on unfavorable terms.[51]

De Filippo follows the *Seagram* and *Standard Oil* logic in that the test adopted focuses on the purpose of the agreement, conspiracy, or combination and not just the incidental result of such a situation. An important area of divergence, however, may be found in the altered treatment of the term "unfavorable." Heretofore the connotation of dealing on unfavorable terms has meant discrimination against a plaintiff whose similarly situated competitors were receiving better or more favorable terms.[52] As a result of *De Filippo*, "unfavorable" may now be construed as meaning a reneging or the retraction of previously offered terms which were more favorable, even if those offered alternatively reflect the status quo.[53] The effect is somewhat analagous to liability for breach of contract. However, with the added variable of a conspiratorial purpose to refuse to deal except on now unfavorable terms, the result becomes a per se unreasonable restraint of trade.

Further indication of the court's concern with the purpose of the conspiracy may be construed from willingness to assess liability even if only one source of supply is foreclosed to the plaintiff. This application of the *Klor's* "line of merchandise" standard is illustrative of the fact that an anticompetitive purpose will be punished even if it results only in the plaintiff being inconvenienced.

It is important to recognize the problems inherent in a broad regulatory statute such as the Sherman Act. Interpreted and applied in a perpetually changing economic environment, the act requires constant judicial scrutiny. As a term of art, "unreasonable restraint of trade" has spawned numerous tests and criteria for assessing liability. The courts have, however, regardless of specific tests, focused on the purpose of the agreement, conspiracy or combination and the resultant effect on free unencumbered trade. This type of analysis would appear to be the only reasonable method of drawing the elusive line between acceptable trade regulation and that which impinges upon the needs of a free economic society.

Had the plaintiffs in *De Filippo* accepted Ford's final offer, they would have become re-established as franchise dealers on equal terms with the other area dealers. It is reasonable to assume that had Ford retracted the proferred favorable terms of its own volition without engaging in an agreement to that effect, the plaintiffs would have been precluded from seeking

51. *Id.* at 464.

52. *Id.* at 462-63.

53. The preferential terms originally offered plaintiffs were later offered by Ford to its other area dealers, who in fact refused them as impractical for their respective situations. The court did not accept this token offer as vindication for the later denial of the terms to plaintiffs who were dissatisfied with the offer. 378 F. Supp. at 464-65.

recovery under the Sherman Act, for unless a business qualifies as a monopoly, it may only be attacked for "concerted" action in restraint of trade. This seeming paradox provides important insight into this area of the law; competitive restraints become suspect not so much for how they restrain, but rather because of the joint manner in which the imposition is conceived. It would appear axiomatic that free competition can survive the actions of separate individuals. However, once these individuals interact toward a common goal of restraint, they then pose an economic threat, even though the purpose of the resulting conspiracy may have been to secure equality of treatment.

If this decision withstands appeal, it should serve to expand the scope of the Sherman Act by establishing as suspect any economic agreement which limits a potential plaintiff's freedom to trade, even if the result is not objectively harmful.

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